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In the

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND
BUREAU OF INDIAN AFFAIRS,
Petitioners,
v.
KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Amici curiae's interest in this case is in preserving public access to federal government records, particularly those that document efforts of interested non-agency parties in controversial government decision-making processes. Congress compels government accountability, in part, through the FOI Act, which requires agencies to disclose the records they use in the course of their business unless one of nine narrowly construed exemptions applies. Thus, *amici* submit this brief in support of the Klamath Water Users Protective Association's argument that Exemption 5 of the FOI Act does not extend to documents submitted by interested third parties to a federal government agency.

STATEMENT OF FACTS

The core issue of this case is whether communications submitted to the Department of the Interior from Klamath Basin Tribes with a direct interest in the outcome of an agency decision can be closed from public inspection under Exemption 5 of the Freedom of Information Act, hereinafter the "FOI Act." The facts relevant to this case are:

In 1993 the Secretary of the Department of the Interior issued an order directing the heads of all agencies to consult with Tribes prior to making decisions that would affect tribal interests and to make these consultations open to public scrutiny. A year later, President Clinton echoed the Secretary's comments for consultation and openness in a memorandum issued to government agencies.

In 1995 the Department of the Interior began the ongoing process of developing a long-term plan for allocation of water from the Klamath River Basin in Oregon to surrounding interests. Several parties, including Native American Tribes, farmers, environmentalists and local cities, have strong interests in the Department of the Interior's decisions. Two of the most vocal interests are the Klamath Basin Tribes and the Klamath Water Users Protective Association, a nonprofit group composed primarily of local irrigation districts and other water users.

The Department of the Interior received documents advocating the positions of the Klamath Basin Tribes, and of other water users, including the Klamath Water Users Protective Association, pertaining to the water allocation in the Klamath River Basin. The Klamath Basin Tribes and the Klamath Water Users Protective Association similarly submitted correspondence to the Department. The Department

signed an agreement with the Klamath Basin Tribes labeling them "consultants," but did not sign a similar agreement with the association.

Both the Tribes and the association submitted FOI Act requests to agencies of the Department of the Interior, including the Bureau of Indian Affairs, in an effort to view other parties' correspondence with the department. The Klamath Basin Tribes were granted access to the correspondence submitted by the Klamath Water Users Protective Association. However, the Department refused to release the Klamath Basin Tribes' correspondence, citing deliberative-process and attorney-work-product privileges under the FOI Act's Exemption 5, which protects certain inter-agency or intra-agency records.

The Klamath Water Users Protective Association brought suit under the FOI Act to obtain the Klamath Basin Tribes' and others' correspondence with the Department in the U.S. District Court for the District of Oregon. The district court accepted the recommendations of a magistrate judge to grant the Department of the Interior summary judgment because the documents were exempt from the FOI Act as inter-agency or intra-agency memoranda.

The Ninth U.S. Circuit Court of Appeals rejected the Department of the Interior's claim that these records were inter-agency or intra-agency records. The appeals panel wrote that the withheld correspondence had been submitted by an interested party outside the agency in an effort to sway the agency's decision on the allocation of water resources, and, therefore, it was not exempt under Exemption 5.

SUMMARY OF THE ARGUMENT

This brief urges the Court to affirm the Ninth Circuit's opinion based on the statutory intent of the Freedom of Information Act. The FOI Act is clearly a disclosure statute and Congress intended that exceptions to the general rule of disclosure be narrowly tailored. Because these records are not inter-agency or intra-agency records exempt under Exemption 5, or any other exemption to the FOI Act, they should be released to the public.

The public has a strong interest in the Department of the Interior's water allocation decisions, in the influence various outside and competing interests bring to bear on the decision-making process, and in how the government responds to that influence.

Water allocation decisions are important all across the country for economic, environmental, cultural and a myriad of other reasons. Denying the public access to communications from selected interests will bar the public from understanding how the government reaches these decisions, even though this Court has said that a core purpose of the FOI Act is to foster public understanding of the operations and activities of government.

These tribal communications with the Department of the Interior are not inter-agency or intra-agency records. Following the FOI Act's mandate to narrowly construe exemptions, the Ninth Circuit refused to extend Exemption 5 to these records written by a non-agency party to affect the outcome of an agency's decision-making process. The Ninth Circuit's decision should be affirmed. To deny the public access to information submitted by parties involved in a controversial government decision-making process undermines the public's

ability to oversee the workings of its government.

ARGUMENT

I. It is necessary for the public to have access to communications of interested parties attempting to influence an agency during a decision-making process.

The public has a strong interest in knowing who is influencing the government in its decision-making process and how the government accepts or rejects that influence. The FOI Act should serve that interest, and enable the public to comprehend that influence.

In gathering the multiple and conflicting views of tribal, environmental, farming, commercial and other entities, the Department of the Interior is preparing to make complicated decisions that will affect many lives and livelihoods. As evident from the *amicus* briefs submitted on the petition for writ of certiorari, there are a multitude of parties that are interested in the outcome of these determinations.

The Klamath Basin Tribes and the Klamath Water Users Protective Association provided the Department of the Interior with communications evidencing their claims of rights to the water and recommendations for the allocation of those rights. Subsequently, both parties made FOI Act requests for each other's communications. The Tribes were granted their request because the records were not considered exempt. Even though the tribal communications were submitted in the same way as the Klamath Water Users Protective Association communications, they were not released.

Water rights are an extremely controversial issue across

the country, especially in the West, where:

> water is power, literally and figuratively . . . people's attachments to water extend far beyond its financial benefits; water symbolizes security, opportunity, and self-determination. In the desert, it is associated with life, power, and status.

Wendy Nelson Espeland, THE STRUGGLE FOR WATER, POLITICS, RATIONALITY, AND THE IDENTITY IN THE AMERICAN SOUTHWEST, 4-5 (1998).

Historically, the war over water has had a significant impact on the shape of the West. The modern city of Los Angeles and the Owens Valley, where it finds most of its water, have been shaped culturally, politically and economically by their struggled with water rights:

> The scarcity of water in Los Angeles created a strong sense of community in that city. This sense of community permitted (or required) a search for water sources that eventually led to a small agricultural valley in the Sierra Nevada's 300 miles away. . . Transporting the water resulted in continued growth, maintenance of capital values and a stronger community in Los Angeles but it ended economic activity, reduced capital values and decimated a community in Owens Valley.

Donald R. Field, James C. Barron & Burl F. Long, WATER AND COMMUNITY DEVELOPMENT, SOCIAL AND ECONOMIC PERSPECTIVES, 29 (1974).

Because water allocation is such an important issue across

the country, it is essential for the public to know the status of water rights adjudications and water allocations. Without comprehensive access to the opinions expressed, the public cannot critique the government's water allocations decisions, and the news media, who depend upon access to government records, cannot adequately inform the public on these matters. Because of this public concern, the news media devote much effort to covering these issues.

For instance, in one week, more than 40 news stories involving water rights appeared in news publications of general interest around the country.[2] Several stories concerned a pending effort by Native American Tribes to unseat a congressional representative in Montana in order to promote more legislation preferential to their water rights. This issue was covered by publications in as far away as Los Angeles. Kim Murphy, *Native Americans get in the Spirit of Political Empowerment; Elections: Tribes Nationwide are Launching Get-out-the-vote Drives, Seeking to Raise Their Voice Over Environmental and Other Issues Affecting Them*, LOS ANGELES TIMES, Nov. 1, 2000 at Part A, Part 1, Page 16.

Stories on water rights also appeared in specialized publications. For example, a legal newspaper covered a Ninth Circuit decision to treat a Native American Tribe as a state under the Clean Water Act and its effect on subsequent case law. *Non-Indian's Suit Challenging Tribe's Authority to Regulate Her Land is Revived*, REAL ESTATE/ENVIRONMENTAL LIABILITY NEWS, vol. 12, no. 3, Oct. 27, 2000; *Montana v. EPA*, 137 F. 3d 1135 (9th Cir. 1998),

[2] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for the week of October 26 to November 1, 2000 for "water rights."

cert denied, 525 U.S. 921 (1998).

There were no less than 200 stories over the last two years about Native American Tribes' claim of right to water access during a Department of the Interior determination of how to allocate water.[3] *The Denver Post* profiled the Department of the Interior's allocation of the Animas-La Plata water project to Denver and Colorado when the Ute Native American Tribe had a claim of right to some of the water. Bill McAllister, *Senators Debate Animas-La Plata But Vote on Water Project Delayed for Weekend Campaigning*, THE DENVER POST, Oct. 20, 2000 at B-6.

Additionally, the *Albuquerque Journal* profiled the Rio Grande Conservancy District's attempt to garner increased access to water previously diverted to Native American reservation land under an agreement with the Department of the Interior. Bill Hume, *District Seeks To Use Tribal Sovereignty To Block ESA*, ALBUQUERQUE JOURNAL, May 21, 2000 at B2.

The Klamath River Basin water controversies have also been covered extensively by the press. A search of the last two years of media coverage of the Department of the Interior's ongoing struggles over the allocation of water from the Klamath River Basin returned over 20 news stories on the issue.[4]

[3] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for the "'department of the interior' and indian w/5 'water right'."

[4] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for "klamath and water w/50 'department of

(continued...)

The news media cover these issues because they are of great public concern. The media cannot serve the public's interest in understanding these issues when pertinent views influencing government decisions are withheld.

II. One significant purpose behind enacting the Freedom of Information Act was to promote governmental accountability.

It is clear from the Senate report accompanying the enactment of the FOI Act that the purpose of the bill was "to establish a general philosophy of full agency disclosure." S. REP. NO. 813, 89th Cong. 1st Sess. 3 (1965); *see also County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1980).

While signing the FOI Act, President Johnson said the bill was designed to promote governmental accountability:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy

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[4](...continued)
interior'" over the last two years. *See, e.g.*, Richard Carelli, *Supreme Court to hear FOIA case in water-use dispute*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, Sept. 26, 2000 at State and Regional, Washington Dateline; Julie Tamaki, *California and the West; farmers, tribes have stake in river ruling' environment: Babbitt is expected to decide soon on plan to double trinity's flow and aid fish. Opponents say the water is needed for irrigation and power generation*, LOS ANGELES TIMES, Aug. 9, 2000 at Part A; Part 1; Page 3; Metro Desk.

> around decisions which can be revealed without injury to the public interest.

Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966).

This Court has recognized that the FOI Act's role in enabling citizens to act as watchdogs has not been lost in the cases before it. This Court wrote that the FOI Act "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Also, this Court acknowledged the FOI Act's role in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This view is consistent with this Court's interpretation of the "purpose" of the FOI Act in a case where records were denied. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

The U.S. Department of Justice has also acknowledged the disclosure purpose of the FOI Act. In 1993 Attorney General Janet Reno rescinded the Department of Justice's 1981 guidelines for defending FOI Act denials, setting the new policy for FOI Act litigation. She wrote that the Department of Justice would "apply a presumption of disclosure" when deciding whether to defend FOI Act denials. Janet Reno, *Memorandum for Heads of Departments and Agencies*, Joint Appendix 138, 138 (Oct. 4. 1993). This presumption, she wrote, is to fulfill the "primary objective" of "maximum responsible disclosure of government information." *Id.*

III. Exemptions to the Freedom of Information Act are to be narrowly tailored so as not to overburden the primary purpose of the Freedom of Information Act — public disclosure. A narrow reading of Exemption 5 would certainly not allow it to reach the comments of an outside party seeking to further its own interests.

Certainly there are tensions that could arise from the disclosure of government information, and Congress accounted for those that would merit withholding in the nine exemptions codified in the FOI Act. As the legislative history indicates, Congress expected these exemptions to be interpreted with an eye on the fullest disclosure possible. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); H.R. REP. NO. 1497, 89th Cong. 2d Sess. (1966). Because the primary purpose of the FOI Act is disclosure, any exemptions must be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Even though there may be a broadly written exception, it should be construed as narrowly as possible to effect the public disclosure objective of the FOI Act. *Young v. Rice*, 826 S.W. 2d 252, 254, 308 Ark. 593, 596 (Ark. 1992).

The plain text of Exemption 5 allows withholding of documents that would be protected from disclosure when the government is in civil litigation with another party. Therefore, the ultimate question courts must answer in determining whether a document is protected under Exemption 5 is if the document would normally be released under a showing of relevance to the court in a civil case. *United States Dep't of Justice v. Julian*, 486 U.S. 1, 11-12 (1988); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1994).

The U.S. Court of Appeals for the D.C. Circuit has gone the farthest in extending the reach of Exemption 5 by allowing records created by outside objective consultants to be considered inter-agency or intra-agency records. *Formaldehyde Inst. v. HHS*, 889 F.2d 1118 (D.C. Cir. 1989); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). However, the D.C. Circuit has only extended Exemption 5 to parties that have no interest in the outcome of the decision. *Formaldehyde*, at 1123-24; *Soucie*, at 1078. The documents the D.C. Circuit has extended Exemption 5 to cover are created by objective decision-makers who aid the agency in objectively determining its course of actions. The D.C. Circuit's rationale has been that without protection from disclosure, objective parties, who are aiding the agency out of some sense of civic duty, may not want to become embroiled in controversial agency policy making. *Soucie*, at 1078. This rationale does not extend to interested parties who would submit communications to affect agency decisions with or without protection from public disclosure, such as the Klamath Basin Tribes in this case.

Other federal circuits have not defined Exemption 5 as broadly as the D.C. Circuit. Instead these circuits have taken a more narrowly tailored view of the exemption. In *Van Bourg v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985), the Ninth Circuit held that Exemption 5 would not cover affidavits made by persons outside the agency because they were not created inside the agency or by anyone who had a formal relationship with the agency.

The U.S. Court of Appeals for the Seventh Circuit shared the narrow view of Exemption 5 when it rejected the NLRB's argument that possession of documents made by outside persons made them inter-agency documents. *Thurner Heat Treating Corp. v. NLRB*, 839 F.2d. 1256, 1259-1260 (7th

Circ. 1988). Like the Ninth Circuit's ruling in *Van Bourg*, the Seventh Circuit found that statements of persons not employed by an agency were not inter-agency or intra-agency records.

The U.S. Court of Appeals for the Second Circuit took an even narrower approach to Exemption 5 in *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999), by refusing to extend Exemption 5 to a letter written by a New York city councilman to the Department of Housing and Urban Development. Although the state agency was a partner with the federal agency in task forces and investigations — arguably a formal relationship with the federal agency — the Second Circuit found that Exemption 5 did not extend to a letter sent to the federal government by a member of state government. *Id.*

IV. Documents submitted by a non-governmental party for the purpose of promoting its self-interest in the outcome of an agency determination are not inter-agency or intra-agency documents.

The Klamath Basin Tribe's letters to the Department of the Interior are not protected communications under Exemption 5, no matter what circuit's test for inter-agency or intra-agency documents is accepted. Allowing them to be so would offend the purpose of the FOI Act by closing public access to ex-parte communications from parties with an interest in the outcome of controversial agency determinations.

The Klamath Basin Tribes are interested parties in an agency determination of public importance. Not only are these communications clearly outside the bounds of the FOI Act's exemptions, but to allow them to be classified as closed under

Exemption 5 would destroy the FOI Act's applicability to agency records and the public's and press' governmental watchdog ability.

At the outset of the Department of the Interior's process in making the determination of the fate of the Klamath River Basin, it had the Klamath Basin Tribes sign consultation agreements. These were in-line with a directive from President Bill Clinton to "consult . . . with" Native American Tribes when making agency decisions that affect tribal interests. William J. Clinton, *Memorandum for the Heads of Executive Departments and Agencies*, Joint Appendix 49, 50 (April 29, 1994). However, the Ninth Circuit rejected the Department of the Interior's attempt to make the Klamath Basin Tribe's "consultants" for Exemption 5 purposes because even under the D.C. Circuit's analysis, records of communications to an agency from interested parties are simply not inter-agency or intra-agency records.

The Ninth Circuit's decision in this case was well founded. The "consultant" status of the Klamath Basin Tribes set forth in their agreement with the Department of the Interior is far differnt from the "consultant" relationship to which the D.C. Circuit has extended Exemption 5. *Soucie*, at 1078. The D.C. Circuit only extended the inter-agency and intra-agency tests to reach communications from consultants who are objective evaluators of agency policy, not interested parties. To allow government agencies to contract in this way would, in effect, allow an agency to close most, if not all, of its records by simply signing agreements with outside persons.

Despite the Department of the Interior's relationship with the Klamath Basin Tribes, these communications are created by outside interested parties. These documents, by their very nature of being created by outside interested parties, cannot

possibly disclose the policy-making process of the Department of the Interior. Therefore, they fail to meet the basic test for the deliberative process privilege.

V. Consultations with Native American Tribes about government decisions that affect tribal interests are to be open to the public so that the press and other interested groups can evaluate controversial tribal influence on government decisions.

The Klamath Basin Tribes may have a unique, trust-like relationship with the Department of the Interior. However, this relationship does not afford the Tribes greater rights in agency determinations than other parties involved in the determination. *Skokomish Indian Tribe v. F.E.R.C.*, 121 F.3d 1303, 1308-09 (9th Cir. 1997); *Covelo Indian Community v. F.E.R.C.*, 895 F.2d 581, 586 (9th Cir. 1990). In cases decided by the Ninth Circuit, the United States trust relationship with Native Americans has not been found to grant Tribes greater rights than a party would normally receive under the Federal Energy Regulatory Commission's regulations. *Skokomish Indian Tribe*, at 1308-1309; *Covelo Indian Community*, at 586.

Because the Klamath Water Users Protective Association's communications with the Department of the Interior were open for public inspection, the Tribes' communications should likewise be open for public inspection. "To hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department." *Klamath Water Users Protective Ass'n v. Department of the Interior*, 189 F.3d 1034, 1039 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28

(2000).

Finally, and perhaps most importantly, the Department of the Interior's consultations with the Tribes have been declared public by the President and the agency itself. The Secretary of the Department of the Interior issued a directive in 1993 that the heads of all agencies should consult with Tribes prior to making a decision that could affect tribal interests. Secretary of the Interior Bruce Babbit Order No. 3175, Joint Appendix 52, 53 (Nov. 8 1993). The directive explicitly stated that these consultations "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposals." *Id.* President Clinton issued a memorandum containing an identical directive in 1994. William J. Clinton, *Memorandum for the Heads of Executive Departments and Agencies*, Joint Appendix 49, 50 (April 29, 1994); *Klamath Water Users Protective Ass'n*, at 1039.

CONCLUSION

The Federal Freedom of Information Act was created by Congress in part to aid the public and the press in observing the processes of government. For this reason Congress insisted that exceptions to the FOI Act should be interpreted narrowly.

As organizations dedicated to furthering public access and to helping reporters keep the public informed of the government's actions, *amici*'s interest is to protect reporter access to governmental records. Although the Department of Justice may wish to make this case seem like an isolated issue of access to tribal communications, what it asks this court to rule will have a more far-reaching effect on access to government documents. A ruling in line with the Department of Justice's

argument could close access to documents submitted to a federal agency so long as the agency labels the submitting party a "consultant." This potential for agencies to circumvent the objectives of the FOI Act would not only prevent water users from viewing the arguments of competing interests, it would allow parties who stand to reap financial benefits to press their interests with the government completely cloaked from public scrutiny.

We believe that the Department of Justice's position would not only interfere with the right of the press and the public to inspect public documents, but that it offends the FOI Act's mandate of disclosure. For this reason, we ask the Court to reject the Department of Justice's arguments and affirm the decision of the Ninth Circuit.

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